STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 20, 2014
v	No. 313118 Wayne Circuit Court
JAMES MURAL PRYOR, Defendant-Appellant.	LC No. 12-001671-FC

Before: SERVITTO, P.J., and SAWYER and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to murder, MCL 750.83, three counts of unlawful imprisonment, MCL 750.349b, two counts of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 25 to 50 years' imprisonment for assault with intent to murder, 5 to 15 years' imprisonment for each count of unlawful imprisonment, two to four years' imprisonment for each count of felonious assault, and two years' imprisonment for felony-firearm. We affirm.

Defendant's convictions arose out of a shooting that occurred in the early morning hours at a home in the city of Detroit. Earlier in the evening, Marlon Raines attended a nightclub in Livonia. While there, he saw defendant and the two exchanged greetings and shook hands. Raines left the nightclub at around 1:40 a.m. and headed to his home in Detroit, where an acquaintance of his, Michael Baker, was staying. When Raines arrived home, he called Kateisha Mason over, and shortly after she arrived, they went to sleep in Raines's bedroom. Defendant and Albert Hughes arrived unannounced at Raines's home. Raines and Mason were asleep in Raines's bed when Baker came into the bedroom calling Raines's name. When Raines awoke, he saw defendant and Hughes standing at the doorway of his bedroom. Hughes was holding a gun and defendant would not allow Baker or Raines to leave the bedroom. Raines and defendant began conversing about an incident involving Raines and Raines's brother. Raines pled with defendant and begged for his life. There was a knock at the front door, and defendant went to answer it while Hughes continued to hold Raines, Mason and Baker at gunpoint. When defendant returned, he told Hughes, "Come on man, we got to go. Do this nigger." Hughes then told Raines to sit on the bed and look the other way so that Raines would not see Hughes shoot him. Raines sat on the bed and defendant repeatedly told Hughes to "go on and do it." Hughes

hesitated and defendant told him, "give me the gun I'll do it." Hughes then shot Raines in the back of the neck.

After being shot, Raines was able to get up and attack Hughes, and they tussled for the gun out into the hallway. When Raines and Hughes fell to the floor while wrestling for the gun, defendant and Baker both bolted for the front door. Raines was able to grab the gun while they were wrestling and fired three shots. The first shot struck his own wrist and the second two shots struck Hughes in the chest. After being shot in the chest twice, Hughes got up off the floor and ran towards the front door. Raines chased him and beat him in the back of the head with the pistol. Hughes fell into the corner of the living room up against the television and eventually died. Mason called the police and tended to Raines's wounds. The police eventually found defendant lying in the backseat of a car located approximately a mile away from the home.

After defendant was convicted and sentenced, he made a motion for a new trial and a *Ginther*[1] hearing based upon several allegations of ineffective assistance of counsel and prosecutorial misconduct. The trial court denied this motion in a written opinion.

I. JURY OATH

Defendant contends that the trial court committed error requiring reversal because the court's clerk administered a defective oath to the jurors. We disagree.

Because defendant did not object to the jurors' oath, this issue is unpreserved and reviewed for plain error affecting defendant's substantial rights. See *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). The process of swearing in jurors is controlled by MCR 6.412(F), which provides that, "[a]fter the jury is selected and before trial begins, the court must have the jurors sworn." Under MCR 6.412(A), MCR 2.511 governs the procedure for selecting and impaneling the jury, and MCR 2.511(H)(1) provides that the "jury must be sworn by the clerk substantially as follows":

> Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God.

The statutory version of the jury oath in MCL 768.14 provides as follows:

> The following oath shall be administered to the jurors for the trial of all criminal cases: "You shall well and truly try, and true deliverance make, between the people of this state and the prisoner at bar, whom you shall have in charge, according to the evidence and the laws of this state; so help you God."

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant asserts that the trial court committed plain error because the jury was sworn in using a variation of the oath found in MCR 2.511(H)(1), as opposed to the statutory version of the jury oath prescribed in MCL 768.14. Defendant contends that the statutory version of the jury oath prescribed in MCL 768.14 and the oath set forth in MCR 2.511(H)(1) are conflicting, and the statutory version of the oath controls.

In determining whether there is a real conflict between a statute and a court rule, both should be read according to their plain meaning. *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 722; 575 NW2d 68 (1997). Because the statute requires a particular oath be administered in all criminal cases, and the oath found in MCR 2.511(H)(1) does not follow the prescribed language in the statute, the court rule and the statute are in conflict. When a court rule established by the Supreme Court conflicts with a statute, the court rule governs if the matter pertains to practice and procedure because our Supreme Court is given the exclusive rulemaking authority in matters of practice and procedure. Const 1963, art 6, § 5; *People v Conat*, 238 Mich App 134, 162; 605 NW2d 49 (1999). Given that our Supreme Court holds exclusive rulemaking authority in matters of practice and procedure, the oath prescribed in MCR 2.511 controls over that set forth in MCL 768.14 because it involves a matter of practice and procedure.

Alternatively, defendant asserts that the trial court committed plain error because the oath administered to the jury did not contain the language "so help you God" or under the "pains and penalties of perjury." A defendant's right to be tried by an impartial jury is a constitutional guarantee. *People v Pribble*, 72 Mich App 219, 224; 249 NW2d 363 (1976). The oath required at the beginning of a jury trial is "both a solemn promise to fulfill the duty to act in accordance with the law at all stages of a trial and also a mechanism to ensure that jurors decide the case honestly in accordance with the law and on the basis of the evidence presented." *People v Allan*, 299 Mich App 205, 215; 829 NW2d 319 (2013). Furthermore, MCR 2.511(H)(1) only requires that the oath be "substantially" followed.

Prior to trial, the court's clerk administered the following oath:

> *THE CLERK:* Do you solemnly swear or affirm that in this action now before the Court, you will justly decide the questions submitted to you, unless you are discharged by the Court from further deliberations. You will render a true verdict, and you will render your verdict only on the evidence introduced and in accordance with the instructions of the Court?
>
> *THE JUROR:* I do. (In unison)

Although the oath did not specifically include the words "so help you God" or under the "pains and penalties of perjury," it is nearly identical to the oath prescribed in MCR 2.511(H)(1). Moreover, the oath is a solemn promise to fulfill the duty to act in accordance with the law, and the oath administered to the jurors was satisfactory because it required the jurors to "solemnly swear or affirm" they would "justly decide the questions submitted" to them, and "render a true verdict" based "on the evidence introduced and in accordance with the instruction of the Court." Therefore, we find no plain error.

II. INEFFECTIVE ASSISTANCE

Defendant next asserts that he was denied the effective assistance of counsel by numerous errors of his trial counsel. We disagree.

Absent an evidentiary hearing, this Court's review of counsel's performance is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Although defendant requested a new trial and sought an evidentiary hearing under *Ginther* concerning his counsel's ineffectiveness, because no evidentiary hearing was held, this Court's review is limited to mistakes apparent on the record. Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id.*

The United States and Michigan Constitutions guarantee a defendant the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. To establish ineffective assistance of counsel, defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). A defendant must also overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Sabin*, 242 Mich App 656, 659; 620 NW2d 19 (2000). "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant first argues that trial counsel was ineffective for failing to object to the court's clerk administering a defective oath. As discussed previously, the oath administered here was satisfactory. Because an ineffective assistance claim cannot be premised on the failure to make futile or frivolous objections, trial counsel was not ineffective for failing to object to the oath administered to the jury. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Next, defendant contends that his trial counsel was ineffective for failing to request the missing witness instruction, CJI2d 5.12.[2] Defendant asserts that the prosecution failed to exercise "due diligence" and/or "good faith" in attempting to secure Baker, a res gestae witness.

Under MCL 767.40a(1), (2), and (3), the prosecution must notify a defendant of all known res gestae witnesses and all witnesses that the prosecution intends to produce at trial. *People v Cook*, 266 Mich App 290, 295; 702 NW2d 613 (2005). A prosecutor who endorses a

[2] CJI2d 5.12 states: "*[State name of witness]* is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case."

witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). A prosecutor who fails to produce an endorsed witness may show that the witness could not be produced despite the exercise of due diligence. *Id.* If the court finds a lack of due diligence, the court should instruct the jury that it may infer that the missing witness's testimony would have been unfavorable to the prosecution's case. CJI2d 5.12; see also *People v Snider*, 239 Mich App 393, 422; 608 NW2d 502 (2000).

Here, defendant's trial counsel was not ineffective for failing to request the missing witness instruction, CJI2d 5.12. The trial court did not directly address whether there was a lack of due diligence on the record. However, the record indicates that the prosecution exercised due diligence in producing Baker as a witness at trial. On the day of the preliminary examination, Officer Nancy Foster contacted Baker via telephone, and after advising him that he had to be in court, he failed to show up. Once again, prior to trial, Officer Foster contacted Baker via telephone in order to ensure that he appeared in court for trial, but when she identified herself on the phone, Baker hung up and failed to appear at trial. Moreover, Officer Foster testified that the police obtained a material witness detainer and they were unable to track Baker down prior to trial. Although the trial court did not directly address whether the prosecution exercised due diligence in producing Baker at trial, the record suggests that due diligence was exercised and a missing witness instruction was unwarranted. In any event, even if the prosecution did not exercise due diligence, defendant failed to show prejudice. *Toma*, 462 Mich at 302-303. Had the jury been given a missing witness instruction, the inference that Baker's testimony was unfavorable to the prosecution's case would not have been outcome determinative. The prosecution still presented eyewitness testimony from Raines and Mason that defendant committed the charged offenses. Thus, defendant's ineffective assistance of counsel claim fails.

Next, defendant contends that his trial counsel was ineffective for failing to object to the prosecutor's attempt to shift the burden of proof during closing and rebuttal arguments. The prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof. *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). Also, a prosecutor may not comment on the defendant's failure to present evidence because it is an attempt to shift the burden of proof. *Id.* at 464. However, the protective shield of the Fifth Amendment should not be "converted into a sword that cuts back on the area of legitimate comment by the prosecutor on the weaknesses in the defense case." *People v Fields*, 450 Mich 94, 109; 538 NW2d 356 (1995), quoting *United States v Hasting*, 461 US 499, 515; 103 S Ct 1974; 76 L Ed 2d 96 (1983) (Stevens, J., concurring). Thus, the prosecution may argue that particular evidence is undisputed or uncontroverted, even if the defendant is the only witness who could have controverted the evidence. *Fields*, 450 Mich at 115. Moreover, although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory that, if proven, might exonerate him, the prosecutor's comment on the inferences created, including the defendant's failure to produce corroborating witnesses or evidence, does not shift the burden of proof. *Id.* at 115-116.

Here, the prosecutor's comments during closing arguments did not shift the burden of proof. In his closing argument, with respect to the encouragement and assistance defendant provided to Hughes, the prosecutor stated:

> Is that encouragement? Is that aiding? Is that assisting, in a crime that we know happened?
>
> How do we know that? Because none of it was questioned. Nobody took the stand. Nobody denied the fact that Mr. Pryor told Mr. Hughes to shoot Mr. Raines.

Despite defendant's contention that these comments shifted the burden of proof onto the defense, he fails to acknowledge the statement made by the prosecutor directly after the above comment. After stating that nobody took the stand to deny the fact that defendant told Hughes to shoot Raines, the prosecution explained:

> The Judge is going to give you additional instructions. And they are going to be well laid out as to what our burden has been from the very beginning. To prove each of the eight counts, each of the elements through evidence, which can be physical. A lot of this stuff and testimonial.

Clearly, the prosecutor reaffirmed that the burden remained on the prosecution to prove each of the elements to the eight counts. Moreover, even absent the statement that the burden remained on the prosecution, the prosecutor's comments on defendant's failure to produce corroborating witnesses did not shift the burden of proof. *Fields*, 450 Mich at 115. Once defendant took the stand and advanced the theory that he did not contribute in the commission of crime, the prosecution was then permitted to comment on defendant's failure to produce a corroborating witness.

The prosecutor's comments during rebuttal arguments also did not shift the burden of proof. The prosecutor, in his rebuttal, stated:

> And you know what? We told you in the beginning, this is the final point. We told you in the beginning that Mr. Pryor is presumed innocent. We told you that he does not, absolutely has no duty to take the stand and testify. No question about that. But once he took the stand and testified, did you hear from his uncle? Did you? Because I didn't. Did you hear from the other person.

Despite defendant's contention that his trial counsel was ineffective for failing to properly object to this comment, this comment itself did not shift the burden of proof to the defense. Because defendant took the stand and advanced the theory that he had no knowledge that Hughes would shoot Raines and he ran to his uncle's house after he heard gun shots, the prosecutor was permitted to comment on defendant's failure to produce corroborating witnesses to prove this theory. *Fields*, 450 Mich at 115. Therefore, the prosecutor did not shift the burden of proof and trial counsel was not ineffective for failing to object to any of the challenged statements in the prosecutor's closing and rebuttal arguments. Moreover, even assuming some of the prosecutor's comments were improper, any prejudicial effect was cured by the trial court's instruction regarding the burden of proof, and, therefore, reversal is unwarranted. *People v Dobek*, 274 Mich App 58, 68; 732 NW2d 546 (2007).

Next, defendant contends that he was denied effective assistance of counsel because his trial counsel failed to sufficiently challenge the prosecution's theory of case. Decisions

regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). This Court will not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012).

Defendant claims that trial counsel did not adequately develop the testimony concerning the close range firing of the gun, which could have discredited Raines's version of the events. However, a review of the record suggests that trial counsel elicited testimony from Dr. Derstine that no gunpowder or stripling was found around Hughes's gunshot wounds, which is not consistent with the close range firing of a gun. Moreover, trial counsel, in closing, asserted that Hughes had no defensive wounds that indicated there had been a fight, and stated: "Now there is nothing in there about a post-range gunshot wound. If you're in the arms with somebody and tussling, then the gunpowder is going to be on your body or near the wound. Nothing about that." Therefore, the record suggests that trial counsel did attempt to discredit Raines's testimony by pointing out that the evidence does not suggest that Hughes was shot from close range. Consequently, trial counsel's performance did not fall below an objective standard of reasonableness, and defendant has failed to show that he was prejudiced by trial counsel's failure to further develop the testimony concerning the close range firing of the gun. *Toma*, 462 Mich at 302-303.

Defendant also asserts that his trial counsel was ineffective because he made no attempt to inquire into why Hughes was found by the police with a phone answering machine on his head. The mere speculation that this line of questioning would have somehow discredited the credibility of Raines is not sufficient to show that trial counsel's performance fell below an objective standard of reasonableness, nor is it sufficient to show that there is a reasonable probability that it would have changed the outcome of the trial. *Id.*

Defendant also argues that trial counsel should have inquired into why the gun recovered by the police had five rounds spent when Raines testified that there were only four rounds fired. Although Officer Dyas testified that the .32 caliber gun had five spent casings inside the chamber, the parties stipulated that only four bullets were recovered, two from inside the home and two from Hughes's body, which is consistent with Raines's version of the events. Simply because the gun recovered had five spent casings inside the chamber, did not automatically create the inference that all five rounds were fired inside the home, and it appears that the quantity of bullets recovered by the police coincided with Raines's testimony. In effect, any attempt to discredit Raines's version of the events with respect to the amount of shots fired would have been fruitless, and trial counsel's failure to inquire into this minor detail did not render his performance deficient, or prejudice defendant. *Id.*

Lastly, defendant argues that trial counsel should have inquired into the fact that Raines referred to the gun as a .38 caliber when, in fact, it was a .32 caliber gun. Despite this contention, defendant fails to show why discrediting Raines on this minor point would have been outcome determinative. The weapon used in the shooting was not in dispute and trial counsel's failure to point out this slight inconsistency did not render his performance deficient, or prejudice defendant.

Next, defendant contends that he was denied effective assistance of counsel because his trial counsel failed to request the jury instruction under CJI2d 2.9, which would have allowed the jurors to ask questions of the witnesses. In *People v Heard,* 388 Mich 182, 187; 200 NW2d 73 (1972), our Supreme Court held that "[t]he practice of permitting questions to witnesses propounded by jurors should rest in the sound discretion of the trial court." The Court further held that the trial judge may permit such question if he wishes, and it was error for the judge to rule that under no circumstances might a juror ask any questions. *Id.* at 188. Defendant asserts that the trial court never gave instructions mentioning the jurors' ability to ask questions of the witnesses and it appears the trial court was not aware of this procedure. Despite this contention, absent from the record is any suggestion that the trial court did not permit such questions under any circumstances. Because it is within the court's discretion to allow the jurors to question the witnesses, and nothing in the record suggests that the trial court ruled that under no circumstances might a juror ask any questions, the trial court did not commit plain error. Thus, any decision by trial counsel to not request a jury instruction under CJI2d 2.9 is presumed sound trial strategy, and further, defendant fails to show that he was prejudiced.

Lastly, defendant argues that the cumulative effect of the above discussed alleged errors by trial counsel denied him a fair trial. However, because there were no errors by trial counsel, this argument does not warrant relief. See *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995) ("[O]nly actual errors are aggregated to determine their cumulative effect.").

III. EVIDENTIARY HEARING

Defendant next contends that the trial court abused its discretion in denying him a *Ginther* hearing. We disagree.

This Court reviews a trial court's decision on whether to hold an evidentiary hearing for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008). An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes. *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011).

The purpose of a *Ginther* hearing is to establish facts that assist the defendant in making his ineffective assistance of counsel claims. *People v McMillan*, 213 Mich App 134, 142; 539 NW2d 553 (1995). Because defendant was not denied the effective assistance of counsel, and because none of defendant's claims required an evidentiary hearing for further factual development, the trial court did not abuse its discretion in denying defendant a *Ginther* hearing.

IV. PROSECUTORIAL MISCONDUCT

Defendant next contends the prosecutor engaged in misconduct by questioning defendant on cross-examination about the prior criminal charges brought against Raines's brother and by making statements in closing and rebuttal arguments shifting the burden of proof. We disagree.

A claim of prosecutorial misconduct generally must be met with a contemporaneous objection or a request for a curative instruction at trial. Where issues of prosecutorial misconduct are preserved, this Court reviews them de novo to determine if the defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818

(2003). However, when a defendant fails to object to the prosecutor's statements, this Court reviews his claims for plain error that affects his substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Because defendant did not object or request a curative instruction for both of his prosecutorial misconduct allegations, our review is limited to plain error affecting substantial rights. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010).

The test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003); *Dobek*, 274 Mich App at 63. Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context. *Thomas*, 260 Mich App at 454. The propriety of a prosecutor's remarks depends on all the facts of the case, and a prosecutor's comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial. *Dobek*, 274 Mich App at 64. Improper prosecutorial conduct or remarks might not require reversal if they address issues raised by defense counsel. *Jones*, 468 Mich at 353.

The prosecutor's questioning on cross-examination did not rise to the level of prosecutorial misconduct. The trial court ruled that the parties were not allowed to bring up the sexual assault charges themselves, but it permitted the prosecution to present evidence and question defendant regarding a prior altercation that gave rise to a "bad blood situation." During cross-examination of defendant, the prosecutor asked defendant if there had been any issues with Raines's brother in the last couple of years. Defendant responded multiple times that nothing serious had occurred. The prosecutor then asked defendant if anything had happened between Raines's brother and defendant's daughter that caused Raines's brother to be charged with a crime. Defendant once again responded that nothing had happened. Defendant eventually acknowledged that there had been an issue between his daughter and Raines's brother, but claimed "We had got over that."

Although the trial court ruled that the prosecution was not allowed to introduce evidence regarding the alleged sexual assault charges, when examining the entire record and evaluating the prosecutor's remarks in context, the prosecutor's questions did not rise to the level of prosecutorial misconduct. The prosecutor only asked specifically whether anything had happened between Raines's brother and defendant's daughter that caused Raines's brother to be charged with a crime. The prosecutor did not introduce any specific details regarding the incident, nor was the jury informed that the incident involved an alleged sexual assault. The prosecutor, in an attempt to explore the possibility that defendant had a motive, appeared to only mention criminal charges because defendant initially refused to acknowledge that there had been some issues involving Raines's brother and his daughter. Therefore, although the prosecutor slightly exceeded the limiting nature of the evidence, the prosecutor's questions did not affect defendant's substantial rights. *Thomas*, 260 Mich App at 453-454.

Defendant also contends that the prosecutor's statements in closing and rebuttal arguments improperly shifted the burden of proof from the prosecution to the defense. As discussed previously, the prosecutor's comments did not improperly shift the burden of proof. Moreover, after the prosecutor made these statements, the trial court subsequently instructed the jury that the prosecution was required to prove each element of the eight charged offenses

beyond a reasonable doubt. Because this Court presumes that a jury follows its instructions, any error did not deny defendant the right to a fair trial. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

V. PRIOR CONVICTION

Defendant also argues that the trial court abused its discretion when it only allowed the introduction of Raines's prior conviction for impeachment purposes, and not as evidence that Raines possessed the weapon prior to Hughes and defendant entering the home. We disagree.

"A trial court's decision whether to admit evidence is reviewed for an abuse of discretion, but if the inquiry requires examination of the meaning of the Michigan Rules of Evidence, a question of law is presented, which we review de novo." *Ackerman*, 257 Mich App at 442. The decision whether evidence is admissible is within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

Defendant contends that Raines's prior conviction for carrying a concealed weapon should have been admitted not only to impeach his trial testimony, but also under MRE 404(b) to establish that he may have been in possession of the firearm himself prior to the shooting. Pursuant to MRE 404(b)(1), which governs the admission of prior bad acts:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Evidence of another crime may be admitted if "(1) it is relevant to an issue other than character or propensity, (2) it is relevant to an issue or fact of consequence at trial, and (3) its probative value is not substantially outweighed by the danger of unfair prejudice." *People v Catanzarite*, 211 Mich App 573, 578-579; 536 NW2d 570 (1995), citing *People v VanderVliet*, 444 Mich 52, 74-75, 508 NW2d 114 (1993). MRE 404(b) applies to the admissibility of evidence regarding the past acts of any person, including a victim or a witness. *Catanzarite*, 211 Mich App at 579. Where a criminal defendant seeks to admit evidence of the bad acts of another person, the defendant "remains bound by the requirement that the evidence is not offered to prove conformity with character." *Id.*

The introduction of the prior conviction as evidence that Raines possessed the weapon before Hughes and defendant entered the home is not relevant to an issue other than character or propensity. On direct examination, Raines testified that he had never shot a gun before. On cross-examination, Raines testified that he has also never handled a gun before. Defense counsel then requested that Raines's prior conviction for carrying a concealed weapon be used as impeachment evidence and also as evidence that he may have been in possession of the weapon. The trial court ruled:

> Well, I don't think that's what we're, we're here to determine. The, the witness [sic] testimony was that, was simply that he testified on direct exam that he, that he hadn't handled a gun before and he testified on cross-examination that he had in fact been tried by a jury and convicted of carrying a concealed weapon. I don't, I don't know that, that's the only things [sic] that they have to consider in terms of determining whether or not they think his testimony is credible or not. And I'm just going to leave it at that. But it can't be used for purposes of determining other stuff. It's just for credibility purposes.

Although defendant contends that Raines's prior conviction was both relevant and material to establishing a defense to the prosecution's theory, evidence of Raines's prior conviction was not offered for a proper purpose under MRE 404(b). Defense counsel sought to convince the jury that the weapon was not possessed by Hughes, but instead, was possessed by Raines simply because Raines had a prior conviction for carrying a concealed weapon. Thus, it is not relevant to an issue other than character or propensity. *VanderVliet*, 444 Mich. at 74. Accordingly, the trial court did not abuse its discretion when it allowed the introduction of the prior conviction for impeachment purposes only.

Affirmed.

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Mark T. Boonstra